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No. 91-1958

Supreme Court, U.S.
FILED
OCT 13 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DONALD L. HELLING, Associate Warden,
Nevada State Prison, *et al.*,

Petitioners,

v.

WILLIAM McKINNEY,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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October 1992

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QUESTIONS PRESENTED

1. Does the State's recent adoption of a formal policy covering smoking in the Nevada state prison system make it inappropriate for the Court to decide the merits of this case?

2. Did the court of appeals correctly hold that a nonsmoking prisoner who is involuntarily exposed to unhealthy amounts of cigarette smoke has a claim for injunctive relief under the Eighth Amendment, if he can prove that the conditions of his confinement, viewed objectively, pose a serious hazard to his health and that prison officials showed deliberate indifference to his situation?

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

1. Proceedings in District Court.

Respondent William McKinney, a Nevada state prisoner, filed this action *pro se* in January 1987 in the United States District Court for the District of Nevada. His complaint, brought under 42 U.S.C. § 1983, claimed a violation of the Eighth Amendment to the United States Constitution based on his involuntary exposure in the Nevada State Prison to smoke from other people's cigarettes, also known as environmental tobacco smoke ("ETS"). Joint Appendix ("J.A.") 5, 14-15. Named as defendants were the Nevada director of prisons, the warden and associate warden of the Nevada State Prison, and the store manager and a counselor at that prison, who are the

petitioners in this Court and to whom this brief will refer collectively as "the State" (J.A. 1-4). [1]

McKinney, a non-smoker, complained of being forced to share a cell with a series of inmates who were heavy smokers, including his then-cellmate, who smoked five packs a day. He stated that prison officials refused to move him to a single cell or to house him with a non-smoking cellmate despite his repeated protests that forced inhalation of smoke was causing nosebleeds, headaches, chest pains, shortness of breath and lack of energy to exercise. He also objected to the fact that smoking is allowed in the prison law library, as it is everywhere in the prison, except the infirmary and the dining area (J.A. 6-11). He sought an injunction to bar prison officials from housing him with inmates who smoke, as well as damages from each defendant (J.A. 14). The State's answer admitted that Mr. McKinney had sought transfers from smoking cellmates "at various times," but denied doing nothing to separate smokers from non-smokers, asserting that prison officials "have made efforts to do so, to the greatest extent possible" (J.A. 17). [2]

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[1] The defendants named in the complaint were sued in their official and individual capacities (*see* J.A. 14), although the case is now proceeding against petitioners solely in their official capacities. Since the case began, four of the named defendants have been succeeded in office as follows: State prison director George W. Sumner by Ronald N. Angelone; warden H.L. Whitley by John V. Ignacio; associate warden Pat Anderson by Donald L. Helling; and store manager John Nye by Charles Horn. *See* Sup. Ct. R. 35.3. Carol Ployhar remains a unit counselor at Nevada State Prison. The complaint also named as defendants two cigarette manufacturers and a distributor of cigarettes sold in the prison, who were not served and thus were not parties to the suit (J.A. 3-4; Appendix to Petition for Certiorari ("Pet. App.") C43 n.1).

[2] To support a claim that the State acted reasonably, both the State and the United States, as *amicus curiae*, rely on an affidavit from Donald Helling (J.A. 21-24), but that affidavit was not part of the trial record. *See* Brief for Petitioners ("Pet. Br.") at 39-40; Brief for the United States ("U.S. Br.") at 3-4. The relevant background is as follows:

Shortly after the complaint was filed, Mr. McKinney moved for a preliminary injunction, Docket Entry ("D.E." 4), to which the State responded with the affidavit of Mr. Helling, who is now the lead petitioner in his capacity as associate warden of the Nevada State Prison. Mr. Helling's duties then included making inmate housing or "classification" decisions, and

In August 1987, Mr. McKinney asked the magistrate handling the case to subpoena an expert who could testify "on the effects cigarette smoking would have on a non-smoker housed in close confines with a heavy cigarette smoker." *See* Appendix to this brief ("App.") at 3a. The request was denied (App. 5a-7a). In May 1988, Mr. McKinney moved for the appointment of a court-appointed expert to testify about the health issues raised by the conditions of his confinement (App. 8a-10a). He stated that he had contacted an environmental toxicologist on the faculty at the University of Nevada School of Medicine in Reno, where the case would be tried, but that expert was unwilling to testify without being paid, and Mr. McKinney, who was proceeding *in forma pauperis*, lacked the resources to pay him (App. 8a-9a). The magistrate denied the motion, reasoning that an expert may be appointed for compensation only under Rule 706, Fed. R. Evid., but that Rule 706 envisions the appointment of an impartial expert, not one who would testify for one side or the other (App. 11a-13a).

Thereafter, the State moved for summary judgment, but its motion was denied. The magistrate explained that Mr. McKinney's allegations of harm based on proximity to a heavy smoker raised disputed issues of material fact which had to be examined under the "deliberate indifference" standard enunciated by this

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his affidavit asserted that an inmate's "personal desires" are taken into account in the housing classification process "insofar as practical" (J.A. 22), but that a ban on placing Mr. McKinney in a wing of the prison which houses smoking inmates would be unduly burdensome (J.A. 23).

In reply, Mr. McKinney disputed these claims (D.E. 12), but his preliminary injunction motion was not resolved because the magistrate entered an order consolidating the hearing on that motion with the trial on the merits (D.E. 13; J.A. 26). Mr. Helling's affidavit was also cited in support of the State's summary judgment motion, which was denied (J.A. 32-35, 46). Mr. Helling was scheduled to testify for the defense at trial (J.A. 61), and thus his affidavit was not offered as a defense exhibit (*see* J.A. 58). Because a judgment was directed in the State's favor before any of its witnesses testified, Mr. Helling's testimony did not become part of the trial record upon which the magistrate based her decision (*see* J.A. 66-73). Thus, the Helling affidavit is, at most, an indication of what Mr. Helling might say if he were to testify in any proceedings on remand, but the State errs in citing his affidavit as if it were a properly admitted part of the trial record. *Cf.* Sup. Ct. R. 24.6.

Court in cases such as *Estelle v. Gamble*, 429 U.S. 97 (1976), and *Rhodes v. Chapman*, 452 U.S. 337 (1981)(J.A. 40-42, 46).

The parties then prepared a pretrial order which stipulated that approximately two-thirds of the inmates at Nevada State Prison smoke (J.A. 50) and further, as Mr. McKinney charged in his complaint, that there are "no restrictions on smoking in the prison's housing units, classrooms or law library," with smoking banned only in the infirmary and dining area (J.A. 51). The parties were, however, unable to agree on such questions as the degree of Mr. McKinney's exposure to tobacco smoke and the effects of that exposure on his health (J.A. 51-52).

A trial was conducted before the magistrate and a jury on 3 October 1989. Mr. McKinney testified on his own behalf, along with two former cellmates and two other inmates at Nevada State Prison. The inmate witnesses were heavy smokers who were called to corroborate the claims in Mr. McKinney's complaint about how secondary cigarette smoke had affected him (J.A. 68-70).[3] Most of the proposed exhibits were admitted into evidence, and they dealt with Mr. McKinney's requests for transfers, complaints about other conditions at Nevada State Prison and similar matters relating to the conditions of his confinement there, as well as his current medical symptoms and their treatment (J.A. 68-70). [4]

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[3] The magistrate did not let Mr. McKinney order a trial transcript at state expense (Pet. App. C40-C41), and thus the exact content of the testimony is not available. Mr. McKinney's pretrial brief proffered that these witnesses would testify that they smoked heavily in his presence, that he complained about his exposure to tobacco smoke, that he never smoked, and that he suffered from the health problems set out in his complaint (D.E. 34).

[4] The magistrate admitted 12 of Mr. McKinney's 13 marked exhibits, rejecting only a set of interrogatories (J.A. 69; Pl. Ex. 3). The minutes indicate that the State's exhibits were admitted, except for Exhibit F (J.A. 70), which the State's brief nonetheless cites (at 35) in an effort to show that Mr. McKinney declined a move to another cell three months after this case was filed, based on his difficulties getting along with other black inmates. The trial transcript is not available, but we understand that Mr. McKinney did not move was based on a failure to get along with members of a prison gang, one of whom was his proposed cellmate. Along the same line, the State suggests (at 37) that something is amiss because Mr. McKinney once complained that

Following the live testimony, Mr. McKinney sought to introduce an additional, 14th exhibit, described as "medical literature, copies of publications, advertisements, etc." (J.A. 71), some of which dealt with the long-term health effects of smoking. The magistrate took the request under advisement, along with the State's motion for a directed verdict (J.A. 71).

When court convened the next day, the magistrate denied Mr. McKinney's motion to introduce his Exhibit 14, dealing with long-term medical effects of smoking, and she also granted the State's motion for a directed verdict (J.A. 72-73). In a written decision, the magistrate explained that she viewed Mr. McKinney's complaint as stating two legal claims: (1) deliberate indifference by the State to his current medical needs, and (2) a constitutional right to have the State house him in a smoke-free environment (Pet. App. D2-D3).

The magistrate acknowledged that the Eighth Amendment bars the State from being deliberately indifferent to Mr. McKinney's medical needs, but she found no evidence of a serious, existing need which was not receiving care. She noted his testimony that he had been subject to certain "cold symptoms," such as nosebleeds, sore throats and watery eyes, but found no proof that cigarette smoke had brought about these conditions (Pet. App. D7). The magistrate noted also that Mr. McKinney had been examined for these symptoms by the prison medical staff, which found "nothing wrong with him that could be treated" (Pet. App. D8). She added that there was no expert or medical testimony showing that any of the petitioners had proximately caused any present injuries, and she cited a lack of proof that exposure to ETS could cause the various symptoms of which McKinney complained (Pet. App. D8-D10).

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several cartons of cigarettes were missing from his cell; that too was explained at trial by the fact that cigarettes are a form of currency in Nevada State Prison, where cash transactions are forbidden. Indeed, we understand that cigarettes were once distributed at no cost to inmates at Nevada State Prison, a practice once followed in the federal prison system, where some inmates received free cigarettes as a means of "institutional management and control and to prevent the development of extortionate practices in connection with the sale of cigarettes to inmates." U.S. Br. at 23 n.19.

Mr. McKinney's second claim was also found to be meritless. At the close of Mr. McKinney's case, before the State had presented any witnesses, the magistrate dismissed this claim as a matter of law. She held that Mr. McKinney had no legal right to be free from cigarette smoke while serving in prison, even though she declined to appoint an expert witness and excluded evidence on the risks of ETS, allowing only evidence on Mr. McKinney's current medical symptoms (Pet. App. D3-D5, C4-C5).

2. Proceedings in the Court of Appeals.

Mr. McKinney appealed to the United States Court of Appeals for the Ninth Circuit, which on 1 February 1991 affirmed in part and reversed in part. In a unanimous ruling, the court reversed the magistrate's dismissal of Mr. McKinney's second claim, holding that she erred in framing that issue in "all-or-nothing terms," inasmuch as this approach "excluded a valid eighth amendment claim lying between these two extremes: that compelled exposure to levels of ETS that pose an unreasonable risk of harm to human health constitutes cruel and unusual punishment" (Pet. App. C5). Thus, the court ruled that a "reasonable factfinder could conclude that the adverse health effects associated with ETS exposure would be especially severe for McKinney" (Pet. App. C20).

In holding that the Eighth Amendment may be violated if prisoners are exposed to an "unreasonable" risk to their health, the court of appeals cited scientific evidence, including a 1986 Surgeon General's report which stated that "a clear judgment can now be made: exposure to ETS is a cause of lung cancer. The data in this Report establish that a substantial number of the lung cancer deaths that occur among nonsmokers can be attributed to involuntary smoking" (Pet. App. C17). The Report added that the scientific case against involuntary smoking "is more than sufficient to justify appropriate remedial action, and the goal of any remedial action must be to protect the nonsmoker from environmental tobacco smoke" (Pet. App. C18). The court also cited a 1990 draft report by the Environmental Protection Agency which estimated that some 3800 deaths each year among non-smokers in the United States could be attributed to ETS, which EPA classifies as a Group A

(known human) carcinogen, along with such substances as arsenic, asbestos, benzene, chromium compounds and vinyl chloride (Pet. App. C18-C19). *See* EPA, Guidelines for Carcinogen Risk Assessment, 51 Fed. Reg. 33,992, 33,999-400 (1986).

In assessing the evolving standards of decency in this area, as required by Eighth Amendment jurisprudence, the court of appeals noted the existence of widespread bans on smoking in public places and confined areas, including, as of 1987, statutes limiting such smoking in 45 states and the District of Columbia, as well as a federal law banning smoking on most domestic airline flights (Pet. App. C26-C27). It further noted: (1) The federal prison system had adopted rules designed to protect non-smokers; (2) The American Jailers Association, representing 6500 jail administrators, had backed a ban on smoking in prisons; and (3) County and state corrections departments in 13 states had either banned or were considering a ban on cigarette smoking in prison as of May 1990 (Pet. App. C27-C29).

The court of appeals thus concluded that Mr. McKinney had stated a claim for injunctive relief and that he "should be allowed to present evidence regarding the level and degree of his exposure to ETS and whether that degree of exposure is sufficient to create an unreasonable risk of harm to his health" (Pet. App. C30). Citing a lack of evidence upon which to base any conclusions about whether these conditions actually posed an unreasonable risk of harm to McKinney's health, the court remanded the case to the district court for factfinding on these issues (Pet. App. C47 n.29).

The court of appeals also decided several issues not raised by the petition, and some of them may be relevant to the Court's consideration of the question presented here. Thus, it reversed the magistrate's ruling that she lacked the authority under Rule 706, Fed. R. Evid., to appoint an expert to testify, at State expense, on smoking and health issues at Nevada State Prison, and the court recommended that such an expert be appointed to testify on remand (Pet. App. C35-C38). The court also upheld the directed verdict in the State's favor as to Mr. McKinney's first claim regarding his current medical symptoms (Pet. App. C38-C40) and found that the named defendants

enjoyed qualified immunity from Mr. McKinney's damages claim (Pet. App. C31). The court added that the magistrate should consider appointing an attorney to represent Mr. McKinney on remand (Pet. App. C30; *see also* Pet. App. A7).

3. Proceedings in This Court and on Remand.

Several weeks after the Ninth Circuit ruled, Mr. McKinney was transferred from the Nevada State Prison in Carson City to the new Ely State Prison in Ely, Nevada, for reasons unrelated to this case, and he is now housed in a single cell in Ely. Despite this transfer, the State sought review in this Court, raising two issues: the Eighth Amendment claim at issue here and the ruling that an expert can be appointed under Rule 706, Fed. R. Evid., at state expense, to testify during any proceedings on remand. *Helling v. McKinney*, No. 91-269 (O.T. 1991). On 15 October 1991 this Court granted the petition, vacated the judgment and remanded the case to the court of appeals for further consideration in light of the intervening decision in *Wilson v. Seiter*, 111 S. Ct. 2321 (1991). *Helling v. McKinney*, 112 S. Ct. 291 (1991), *as amended*, *id.* at 963 (1992)(Pet. App. B1-B2).

Wilson clarified that an Eighth Amendment challenge to prison conditions consists of two parts: an objective component, which asks if the injury complained of is "sufficiently serious" to warrant constitutional protection, and a subjective component, which asks if prison officials acted with a "sufficiently culpable state of mind." *Id.* at 2324. *Wilson* stated that the subjective element is met in prison condition cases if the prisoner can meet the standard used in cases alleging a failure to address "serious medical needs," *i.e.*, "deliberate indifference" to the prisoner's condition. *Id.* at 2323, 2326.

On remand, the court of appeals received supplemental briefs, and on 27 March 1992 it issued an order reinstating its previous judgment, finding that *Wilson* did "not vitiate our determination of what satisfies the objective component" of Mr. McKinney's claim (Pet. App. A5). The court did, however, modify its earlier opinion in light of *Wilson* to state that while "hous[ing] a prisoner in an environment that exposes him to levels of ETS that pose an unreasonable risk of harming his health constitutes the objective component" of an Eighth

Amendment claim (Pet. App. A5-A6), a prisoner must also satisfy the subjective component in order to prevail. The case was thus remanded to the district court "for further proceedings consistent with this court's previous opinion" and with *Wilson* (Pet. App. A7).

4. Developments After Remand.

While this case was pending on remand in the court of appeals, there was a factual development which relates to the conditions of Mr. McKinney's present confinement in Ely and to any future confinement at Carson City.

On 10 January 1992 (the same day that supplemental briefs were filed in the court of appeals), petitioner Ron Angelone, the Nevada director of prisons, issued a smoking policy covering all Nevada prisons (App. 1a-2a). Under it, smoking is to be restricted to designated smoking areas in all classrooms, libraries, gymnasia, chapels, dining areas and infirmaries, as well as other areas in Nevada prisons (App. 1a).

The policy further stated that smoking by inmates or staff would be "strictly prohibited" during meetings and individual inmate counseling or treatment sessions (App. 1a). In addition, and "[c]ontingent upon space availability," wardens may "designate non-smoking sections in inmate dormitory settings," and "[r]easonable efforts may be made . . . to accommodate non-smokers in double bunked housing areas. Non-smoking inmates who wish to be housed with another non-smoking inmate are to provide a written request" to the proper official. The memorandum concluded: "As with any incompatible inmate living situation, accommodations will be made as necessary, consistent with security considerations and space availability" (App. 2a). The State did not advise the court of appeals or Mr. McKinney's counsel of this policy, nor was it mentioned in either the current certiorari petition (which this time raised only the Eighth Amendment issue) or the State's opening brief.

SUMMARY OF ARGUMENT

1. The adoption of a smoking policy in the Nevada state prison system may alter the complexion of this case in a way that renders a ruling on the merits unnecessary and inadvisable. Accordingly, we suggest that the Court may wish to consider

dismissing the writ or ordering the case remanded to the trial court for consideration of whether this development renders the case moot.

The court of appeals allowed Mr. McKinney to seek injunctive relief based on the effects of his exposure to smoke at Nevada State Prison at Carson City. Although he was subsequently transferred to another prison, where he is housed in a single cell, he was temporarily returned to Carson City on three occasions. There is no evidence in the record on whether the conditions of his temporary confinements at Carson City or any future stays there will eliminate the need for injunctive relief. Accordingly, those issues and others which relate to the changes resulting from this new smoking policy can best be resolved by the magistrate on remand.

2. The issue on the merits is whether a complaint of compelled exposure to secondary cigarette smoke, at levels posing an unreasonable risk of harm to an inmate's health, can state a claim for relief as a violation of the objective component of the Eighth Amendment, even though the inmate may not yet be suffering an ailment that can be traced to such exposure. Questions of subjective culpability, which must also be considered before an Eighth Amendment violation can be found, are not before this Court, but were left for resolution by the magistrate.

The court of appeals' "unreasonable risk" of harm standard in the context of compelled exposure to ETS is recognized under and consistent with this Court's cases which have stated that when a state takes persons into custody and holds them against their will, the Constitution imposes a corresponding duty to assume some responsibility for their safety and well-being. *See DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 199-200 (1989); *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982).

The State appears to concede that an Eighth Amendment claim would be stated if Mr. McKinney were presently suffering from a condition that is exacerbated by exposure to cigarette smoke. In denying the existence of any claim for relief here, however, the State takes the view that the Eighth Amendment protects against only those hazards which are immediately

harmful to a prisoner's health or well-being, while offering no protection against exposure to latent or potential hazards, no matter how injurious that exposure may turn out to be. That approach is inconsistent with the rulings of this Court.

Thus, in *Hutto v. Finney*, 437 U.S. 678 (1978), prisoners were able to challenge their exposure to the risk of contracting infectious diseases, although there was apparently no claim that any prisoner had actually done so. And in *Rhodes v. Chapman*, 452 U.S. 337 (1981), the Court cited with approval a number of cases which held that one need not wait to be physically injured in order to obtain relief. Consistent with these principles, the federal appeals courts have recognized that an objective violation of the Eighth Amendment can occur based on conditions such as inadequate fire protections, threats of physical assault, poor lighting, lack of exercise, exposure to the risk of AIDS, as well as exposure to asbestos, pesticides or a carcinogen with a long latency period. Whether a prisoner can actually prevail on such a claim is not the issue; what is clear is that the risk of serious injury in these situations states a claim for relief under the Eighth Amendment.

The State's brief focuses solely on this legal issue without addressing, much less trying to rebut, the scientific and other authorities which the court of appeals cited to buttress its conclusion that compelled exposure to ETS could produce latent injuries which are serious enough to warrant protection under the Eighth Amendment. If anything, the weight of scientific knowledge about the hazards of ETS has grown since the time of the court of appeals' ruling, thus confirming the soundness of that decision.

In making this point, however, it is important to stress that the court of appeals was discussing scientific and other evidence of the sort which *might* be introduced at a trial in this case. The court was not engaging in a discussion of evidence in the *present* record because there is none. The magistrate dismissed Mr. McKinney's claim as a matter of law without taking any testimony on the latent hazards of ETS exposure. Thus, in practical terms, the case comes before this Court as if Mr. McKinney's claim had been dismissed on the pleadings for failure to state a claim. Under these circumstances, dismissal

can be upheld only if there is no set of facts under which he might have a claim for relief, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), which is plainly not the case here.

ARGUMENT

I. THE ADOPTION OF A SMOKING POLICY IN THE NEVADA STATE PRISON SYSTEM MAY RENDER A RULING ON THE MERITS UNNECESSARY AND INAPPROPRIATE.

Before explaining why the judgment below rests on a solid legal footing and should be affirmed, we believe that it is appropriate to discuss briefly the relevance of the factual developments which occurred since the court of appeals first held that Mr. McKinney is entitled to seek injunctive relief regarding the conditions of his confinement at Nevada State Prison in Carson City.

In February 1991, Mr. McKinney was moved from Carson City to Ely, where he is now housed in a single cell. We cited his transfer as a reason for denying review in our brief in opposition (at 5-6); the State responded in its reply brief (at 10) that Mr. McKinney may be transferred back to Carson City, thus suggesting that there was a reasonable chance that Mr. McKinney would again be exposed to the conditions which gave rise to this suit.

The validity of that premise is open to question, however, in light of the State's recent promulgation of a smoking policy aimed at all State prisons. This development was known to the State before the Ninth Circuit issued its second ruling in this case and before the present certiorari petition was filed, answered and granted. Nonetheless, the existence of this new policy was not disclosed to Mr. McKinney, his counsel or the Court until the Solicitor General filed a brief on the merits as an *amicus curiae* in support of the State.

Under the circumstances, we respectfully suggest that the Court may wish to consider dismissing the writ as improvidently granted, *see Sanks v. Georgia*, 401 U.S. 144 (1971), or ordering the case remanded to the trial court for consideration of whether this development may render the case moot. We

recognize that Rule 15.4 does not permit the filing of motions to dismiss a petition and that questions of dismissal lie exclusively within the Court's discretion. *See* R. Stern, E. Gressman and S. Shapiro, *Supreme Court Practice* § 5.15 (6th ed. 1986). Nonetheless, we believe the suggestion is warranted at this time. The new policy was known to the State when the petition was filed and had we been apprised of this change, we could have addressed it in our brief in opposition. *See Board of License Commissioners of Tiverton v. Pastore*, 469 U.S. 238 (1985).

Dismissal of the petition would make sense here, as it would allow the magistrate to consider in the first instance the effect of this new policy on Mr. McKinney's claim for injunctive relief. Moreover, the record is at best ambiguous with respect to exactly what the present conditions are at Carson City and how they are likely to affect Mr. McKinney. Those conditions may be relevant because, since the time he was transferred to Ely nearly two years ago, Mr. McKinney has been temporarily housed at Carson City on three occasions, for at least three weeks each time, in order to attend court proceedings in Reno, where he has other suits pending against Nevada prison officials. We are advised that he was placed in a "closed custody" cell during the first two stays, where he did not have a cellmate, and was not housed as part of the general inmate population. On the third stay, he was placed in the general population, where he was housed in a cell with a smoker who was asked not to smoke and who complied with that request for the two days they shared a cell. During his last stay at Carson City, he noticed that people no longer smoked in the prison library, but went outside to do so. He was not aware, however, that a new policy was in effect and did not otherwise notice any changes indicating that a policy change had taken effect. Mr. McKinney anticipates that he will return to Carson City on several occasions over the next year or so in connection with other litigation he has pending in Reno. [5]

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[5] Although this suit challenges only conditions at Carson City, Mr. McKinney contends that he was never advised that the new policy was being implemented at Ely and claims that it is not being enforced there.

In considering mootness issues, this Court has emphasized that Article III of the Constitution requires a "specific live grievance" at all times between the litigants, not merely an "abstract disagreement" over the constitutionality of a particular policy. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 479 (1990)(internal citations omitted). It is unclear whether the present case meets that test. On the one hand, the State declines to rule out a permanent transfer back to Carson City, and its reply brief at the petition stage seems to suggest (at 10) that inmate housing classifications present a chronic problem to prison administrators, thus implying that this is not a case where a request for injunctive relief has been rendered moot by cessation of the challenged policy and a lack of any "reasonable expectation" that the complaining plaintiff will ever be subjected to that policy again. *See id.* at 481 and authorities cited therein. *See also Honig v. Doe*, 484 U.S. 305, 318-19 & n.6 (1988). On the other hand, Mr. McKinney has been returned to Carson City three times; twice in a cell by himself and once in a cell with an inmate who refrained from smoking, although his isolation from the general population during the first two instances makes it difficult to generalize about how he will be treated if and when he is temporarily returned there in the future and about whether the smoking policy is, in fact, being enforced there.

Because of these ambiguities, which the magistrate is best situated to resolve, we submit that it is not possible for this Court to determine if the case is moot on the present record. The State does not address this issue in its brief, and the Solicitor General, who first brought the new smoking policy to the Court's attention, acknowledges that the case has a "decidedly abstract quality," U.S. Br. at 12, but does not argue that the new policy renders the case moot. His position thus appears to be that the possibility of a permanent move back to Carson City has kept the controversy alive, or else that it is preserved under the "capable of repetition, yet evading review" exception to the mootness doctrine. *See Lewis v. Continental Bank Corp.*, *supra*, 494 U.S. at 481.

For these reasons, and because there has been no factual development of the legal theory recognized by the court of appeals or on subjective culpability issues, we respectfully

suggest that the Court may want to dismiss the writ and allow the trial court to determine the precise dimensions of this controversy in light of the State's smoking policy and other developments. Should the Court decide to reach the merits, however, we now explain why the judgment of the court of appeals was correct and should therefore be affirmed.

II. MR. McKINNEY HAS STATED A CLAIM FOR RELIEF UNDER THE EIGHTH AMENDMENT.

A. Introduction.

At the outset, we believe it is useful to highlight precisely what the lower courts did and did not decide in this case, inasmuch as some of the State's arguments may obscure the precise contours of the Eighth Amendment issue presented for review.

The magistrate viewed Mr. McKinney's complaint as stating two claims: (1) deliberate indifference to the cold-like symptoms of which Mr. McKinney then complained and (2) a broader right to be housed in a smoke-free environment. The trial focused solely on the first issue, and the magistrate decided, based on testimony from Mr. McKinney and other inmates, that his present medical symptoms had been adequately treated by a prison doctor. The court of appeals affirmed, and that claim is no longer a part of the case.

As for the second claim, the magistrate found no "constitutional right for an inmate to be free from exposure to cigarette smoke," at least where the prisoner is not presently suffering from a disease associated with or exacerbated by exposure to ETS, *e.g.*, emphysema (Pet. App. D5). She reached that conclusion as a matter of law, without hearing any expert or other testimony about the potential health hazards of exposure to secondary cigarette smoke. Nor did she receive any evidence relating to what, after *Wilson v. Seiter*, is regarded as the subjective component of an Eighth Amendment violation, as her order denying summary judgment to the State indicated that the factual dispute to be resolved at trial involved the nature of Mr. McKinney's medical condition and what the State had done about it (J.A. 41-42). Thus, the magistrate's ruling on this

second claim is the equivalent of a dismissal for failure to state a claim under Rule 12(b)(6), Fed. R. Civ. P., on the objective element of an Eighth Amendment violation.

The court of appeals, viewing Mr. McKinney's filings with the deference usually accorded *pro se* litigants, *see Hughes v. Rowe*, 449 U.S. 5, 12-13 (1980); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972), read the second claim as embracing a more focused cause of action, namely, "that compelled exposure to levels of ETS that pose an unreasonable risk of harm to human health constitutes cruel and unusual punishment" (Pet. App. C5). Since the magistrate did not consider evidence which might indicate whether conditions at Carson City might pose such a risk to Mr. McKinney, the court of appeals remanded to let the parties litigate that issue (Pet. App. C30, C47 n.29). And when *Wilson v. Seiter* subsequently clarified that subjective culpability must also be considered — a matter not expressly considered at trial in light of the magistrate's view that the case turned on Mr. McKinney's present medical condition (*see* J.A. 41-42) — the court of appeals explicitly directed that this issue be addressed as well (Pet. App. A1-A7).

Thus, the only question presented here is whether, as a matter of law, a claim of "compelled exposure to levels of ETS that pose an unreasonable risk of harm to human health" is cognizable as a violation of the objective component of the Eighth Amendment when the prisoner making the claim is not, at the time of the complaint, suffering from any malady which is exacerbated by such exposure. This point is crucial because the State's brief makes some assertions about what happened at earlier stages of this suit that do not accurately convey what was and was not litigated.

The State argues that the court of appeals erred in remanding this case for consideration of subjective culpability issues because, in the State's view, those issues were fully presented at trial and were resolved in the State's favor. Pet. Br. at 32-41. This contention misconstrues the record, and indeed, both of the State's *amici* seem to agree that the objective element is the only issue presented here. *See* U.S. Br. at 25 (the magistrate "did not separately consider the subjective component in the context of the broader Eighth Amendment principle the court

of appeals recognized"); Brief for State of Hawaii *et al.* ("Hawaii Br.") at 8 (even assuming deliberate indifference to ETS risks can be shown, objective component not met here).

The State's error appears to stem from a failure to distinguish Mr. McKinney's unsuccessful claim regarding his then-current medical condition from his claim regarding the future effects of ETS exposure. The magistrate's finding of no deliberate indifference on the former claim was based on evidence which addressed the conditions Mr. McKinney was then experiencing and the State's response to them. Her conclusions with respect to that evidence deals with *present* injury and cannot be stretched into a finding of no deliberate indifference to any *future* effects of ETS exposure, especially when no separate evidence was heard on that claim. In addition, the State fails to acknowledge that the magistrate decided this case prior to *Wilson v. Seiter*, apparently believing that the sole focus of both claims was the severity of Mr. McKinney's present ailments, which is an objective inquiry. *See* J.A. 38-42. Thus, the magistrate did not make a factual determination as to subjective culpability which precludes Mr. McKinney's right to litigate the claim of future effects which was recognized by the court of appeals. [6]

Moreover, apart from issues of subjective culpability, the State makes the separate argument that the court of appeals erred in adopting the objective "unreasonable risk" standard at issue here. The State contends that this "unreasonable risk" standard is excluded from the case by a pretrial order prepared by Mr. McKinney and a deputy attorney state which supposedly

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[6] Before leaving the topic of subjective culpability, we answer the Solicitor General's point that if this Court is not inclined to reverse the court of appeals outright, it should order a remand to let the magistrate "consider in the first instance the subjective component of the broader Eighth Amendment claim." U.S. Br. at 25. But that is precisely the inquiry which the court of appeals mandated (Pet. App. A6), and it is odd to suggest that the judgment under review should be vacated to let the magistrate decide an issue which the judgment already requires her to address. And to the extent that the State argues that the Donald Helling affidavit shows that subjective culpability was, in fact, litigated before the magistrate, suffice it to say that the affidavit is not a part of the trial record and thus not properly considered here. *See* note 2, *supra*.

indicates that Mr. McKinney's entitlement to a totally smoke-free environment was the only issue presented. The error was compounded, the State argues, because the only issue briefed on appeal was the correctness of the magistrate's decision to grant a directed verdict; thus the court of appeals' decision to formulate its "unreasonable risk" standard and its remand order requiring consideration of evidence in light of that standard are said to go beyond the scope of the issues which were presented for review. Pet. Br. at 46-49. We respond to each point in turn.

First, the pretrial order merely set forth a series of broadly-written factual and legal questions to be resolved at trial, without in any way suggesting that Mr. McKinney was interested only in a smoke-free prison environment and had abandoned any request for less sweeping relief (J.A. 52-53). Indeed, if the State were to prevail on this claim, it would profit very little, inasmuch as Mr. McKinney or another prisoner would be free to file a new complaint which pleads the more narrow cause of action recognized by the court of appeals. Second, Mr. McKinney's framing of the issue on appeal as whether the directed verdict was properly entered against him surely embraces the question of whether the magistrate correctly dismissed a cause of action relating to the future effects of ETS exposure simply because he was not presently suffering any readily apparent effects of that exposure.

In the final analysis, the State's real complaint seems to be that the court of appeals viewed Mr. McKinney's papers with the lenity normally granted to *pro se* litigants and found that it could not "say with assurance" that there is no set of facts which could be proven that would entitle Mr. McKinney to some relief. *Haines v. Kerner*, supra, 404 U.S. at 520-21. As we demonstrate in the rest of this argument, the court of appeals correctly synthesized applicable Eighth Amendment law in this area, and its decision to remand for further proceedings should be affirmed.

B. Applicable Eighth Amendment Standards.

The Eighth Amendment, which applies to the states under the Fourteenth Amendment's due process clause, *Robinson v. California*, 370 U.S. 660, 667 (1962), prohibits "cruel and

unusual punishments" from being inflicted on persons convicted of crimes. The Court "has not confined the prohibition embodied in the Eighth Amendment to 'barbarous' methods that were generally outlawed in the 18th century,' but instead has interpreted the Amendment 'in a flexible and dynamic manner.'" *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989), *quoting Gregg v. Georgia*, 428 U.S. 153, 171 (1976) (opinion of Stewart, Powell, Stevens, JJ.). Or, to use an oft-quoted formulation, the analysis is guided by "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958)(plurality opinion), *quoted in Stanford v. Kentucky*, *supra*, 492 U.S. at 369; *Ford v. Wainwright*, 477 U.S. 399, 406 (1986); *Penry v. Lynaugh*, 492 U.S. 302, 330-31 (1989); *accord Hudson v. McMillian*, 112 S. Ct. 995, 1000 (1992)(objective component of an Eighth Amendment claim is "contextual and responsive to contemporary standards of decency")(internal quotation omitted).

Estelle v. Gamble held that the Eighth Amendment applies not only to punishments meted out in the form of a sentence, but also to any "'unnecessary and wanton infliction of pain'" which occurs during imprisonment and does not serve any penological purpose. 429 U.S. at 103, *quoting Gregg v. Georgia*, *supra*, 428 U.S. at 173. *See also Wilson v. Seiter*, *supra*, 111 S. Ct. at 2326-27; *Whitley v. Albers*, 475 U.S. 312, 319 (1986); *Ingraham v. Wright*, 430 U.S. 651, 670 (1977). Thus, under *Estelle* the Eighth Amendment bars "deliberate indifference" to a prisoner's "serious" medical needs, though it does not extend to a negligent or inadvertent failure to provide care. 429 U.S. at 105-06. The Eighth Amendment protections recognized in *Estelle* have been extended to the conditions in which prisoners are confined, and in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), the Court explained the reasoning behind the *Estelle* line of cases this way: "[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *Id.* at 199-200, *citing Youngberg v. Romeo*, 457 U.S. 307, 317 (1982). The reason for this rule is "simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him

unable to care for himself, and at the same time fails to provide for his basic human needs — *e.g.*, food, clothing, shelter, medical care, and reasonable safety — it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." *Id.* at 200.

The Court has emphasized that an Eighth Amendment violation in the prison conditions context must consist of both a subjective and an objective component. The latter criterion looks to whether the alleged wrongdoing was objectively "harmful enough" to violate the standards of decency demanded by the Amendment, while the subjective element examines whether officials "act[ed] with a sufficiently culpable state of mind" to meet the *Estelle* "deliberate indifference" standard. *Wilson v. Seiter, supra*, 111 S. Ct. at 2326, 2329. *See also Hudson v. McMillian, supra*, 112 S. Ct. at 999.

As we indicated in part A, only the objective component of an Eighth Amendment claim is presented here. In order to answer the question "How harmful is 'harmful enough'?", the Court has used the "unnecessary and wanton infliction of pain" standard and "serious" medical needs analysis in *Estelle*. Thus, the objective prong of an Eighth Amendment violation is met by establishing a deprivation of "'the minimal civilized measure of life's necessities,'" not merely complaints of "routine discomfort," which are "'part of the penalty that criminal offenders pay for their offenses against society.'" *Hudson v. McMillian*, *supra*, 112 S. Ct. at 1000, *quoting Rhodes v. Chapman*, *supra*, 452 U.S. at 347.

In our view, the court of appeals correctly held that Mr. McKinney has stated a claim because he alleged a deprivation which is serious enough to be recognized under the objective standards of the Eighth Amendment. In arguing that this is not so, the State contends that exposure to a hazard cannot be a violation of the objective component of the Eighth Amendment if the most deleterious effects of that exposure, no matter how serious they may be, are not immediately apparent, but are latent. In Part C, we answer this point and explain why exposure to conditions where the hazards are latent are cognizable under the Eighth Amendment.

In part D, we discuss a matter which the State does not address in its brief, namely, the court of appeals' analysis of the scientific and other authorities which buttressed that court's view that a reasonable finder of fact might conclude that compelled exposure to ETS can indeed inflict serious and unnecessary pain on an inmate. In doing so, however, we add the caveat that the court of appeals (and this brief) are discussing evidence which might be introduced at any trial on this issue; no evidence is now in the record because the magistrate dismissed Mr. McKinney's complaint as a matter of law. Because the case comes before the Court in this posture, then, the judgment below may be reversed only if this Court should conclude, as a matter of law, that there are no conceivable conditions under which compelled exposure to tobacco smoke might rise above the level of "routine discomfort" that is part and parcel of prison life, and we respectfully submit that no such conclusion is possible in this case.

C. The Eighth Amendment Protects Prisoners From Exposure To Conditions Which Pose an Unreasonable Risk of Serious Harm, Including Harms Which Are Immediate and Those Which Are Latent.

At the outset, it may be useful to focus once again on what is and is not in dispute. The State and its *amici* seem to concede that if Mr. McKinney were presently suffering a serious medical problem as a result of exposure to secondary cigarette smoke, and if the State were being deliberately indifferent to his needs, then he would have stated a claim for relief under the Eighth Amendment. *See* Pet. Br. at 24-26; U.S. Br. at 13-14; Hawaii Br. at 14. The lower courts uniformly accept this proposition as well. *Hunt v. Reynolds*, No. 91-5711 (6th Cir. 10 September 1992); *Steading v. Thompson*, 941 F.2d 498, 500 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1206 (1992); *Gorman v. Moody*, 710 F. Supp. 1256, 1262 (N.D. Ind. 1989); *West v. Wright*, 747 F. Supp. 329, 332 (E.D. Va. 1990); *Beeson v. Johnson*, 668 F. Supp. 498 (E.D.N.C. 1987). *Accord Franklin v. Oregon*, 662 F.2d 1337, 1346-47 (9th Cir. 1981)(allowing inmate with throat cancer to challenge placement with cigarette-smoking cellmate).

We are told, however, that this case is different because Mr. McKinney is not presently suffering any serious adverse consequences as a result of his exposure to tobacco smoke; therefore, no matter how dire the future consequences of any present or anticipated exposure may be, the "mere possibility" of such injury "does not entitle an inmate to elimination" of that health hazard. Pet. Br. at 43; *see also id.* at 18-19; Hawaii Br. at 8.

This argument relies heavily on a comment by the Tenth Circuit in another case involving a non-smoking prisoner to the effect that this Court has never "held that a potential, distant harm to a prisoner's health is a serious medical need," and thus the Eighth Amendment does not protect such a prisoner from exposure to secondary cigarette smoke. Pet. Br. at 21-22, *quoting Clemmons v. Bohannon*, 956 F.2d 1523, 1527 (10th Cir. 1992)(*in banc*). This argument is problematic for several reasons.

First, the argument, if accepted, would dramatically limit the scope of Eighth Amendment protections to those situations where a prisoner is exposed to a condition where death or serious injury is instantaneous (or nearly so). Under this formulation, the Eighth Amendment would not apply to situations where the prisoner is exposed to conditions which produce no immediate (or immediately apparent) injuries, even if it is a certainty (or at least a high probability) that the prisoner will die or endure a painful illness at some future time.

Indeed, if this were the law, then prison officials could decide to give every prisoner a flu shot with the same needle, even if some prisoners are HIV-positive and reusing a needle in this fashion could pass the HIV virus to other prisoners, thus assuring their deaths from an AIDS-related illness at some future point. According to the State, the Eighth Amendment imposes no obligation on prison officials to guard against such infection and requires only that they attend to a prisoner's "serious medical needs" once he actually contracts an AIDS-related illness. Or, to take a less dramatic example, this theory would permit prison officials to refuse to take any steps to protect prisoners from faulty electrical wiring, overloaded sockets, or other potential sources of a prison fire; under the

State's theory, they would be obliged to act only when a fire breaks out and only to evacuate and give adequate medical treatment to those injured in the blaze.

Second, the State's contention is also problematic because it flies in the face of this Court's statement in *DeShaney* that "reasonable safety" is one of the "basic human needs" which the Eighth Amendment protects. 489 U.S. at 200. Or, as the Court put it in *Youngberg v. Romeo*, *supra*, it is "cruel and unusual punishment to hold convicted criminals in unsafe conditions." 457 U.S. at 315-16. *Cf. Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)(noting in non-Eighth Amendment context the "obligation" of prison officials "to take reasonable measures to guarantee the safety of the inmates"). To be sure, the guarantee of "reasonable safety" in an Eighth Amendment context does not mean perfect safety (which cannot be guaranteed in any case), but only a level of safety which is sufficient to avoid the "unnecessary and wanton infliction of pain." But as this Court has recognized, the Eighth Amendment may entitle prisoners to an award of injunctive relief to protect them from conditions which are not presently causing "serious" injury, but which could do so in the future unless the harm is averted.

Thus, in *Hutto v. Finney, supra*, this Court upheld two lower court rulings that the conditions in the Arkansas penal system violated the Eighth and Fourteenth Amendments, particularly with respect to the confinement of prisoners together in a "punitive isolation cell." Some of these prisoners "suffered from infectious diseases such as hepatitis and venereal disease"; nonetheless, the mattresses were "removed and jumbled together each morning, then returned to the cells at random in the evening," when they were given to prisoners to spread out on the floor. 437 U.S. at 682-83. This was only one of several conditions which led the district court to find a violation of Eighth Amendment standards. This Court did not, however, hold that consideration of this factor was error, on the theory that the infectious diseases might be slow to spread or to manifest themselves among the affected prisoner population. Indeed, the Court noted that the district court had "ample authority . . . to address *each element* contributing to that violation." *Id.* at 687 (emphasis added).

In *Rhodes v. Chapman*, *supra*, the Court cited with approval several lower court decisions allowing prisoners to use the Eighth Amendment to obtain relief against conditions which threatened their personal safety. 452 U.S. at 352 n.17. One case was *Ramos v. Lamm*, 639 F.2d 559, 572 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981), which stated that a prisoner "does not need to wait until he is actually assaulted before obtaining relief." This principle has been adopted in other circuits too, *see Woodhous v. Commonwealth of Virginia*, 487 F.2d 889, 890 (4th Cir. 1971); *Finney v. Arkansas Board of Correction*, 505 F.2d 194, 201 (8th Cir. 1974), which were cited for that proposition in another case *Rhodes* cited, namely, *Pugh v. Locke*, 406 F. Supp. 318, 329 (M.D. Ala. 1976), *aff'd as modified*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part on other grounds*, 438 U.S. 781 (1978). Finally, in *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974), the court found an Eighth Amendment violation based on threats to personal safety, such as exposed electrical wiring, inadequate firefighting equipment, and a practice of allowing inmates with "serious contagious diseases" to "mingle with the general prison population." *Id.* at 1300. *See also Morgan v. District of Columbia*, 824 F.2d 1049, 1057-58 (D.C. Cir. 1987)(constitutional right to be protected from unreasonable threat of violence), *cited in Wilson v. Seiter*, *supra*, 111 S. Ct. at 2327.

The federal appeals courts have recognized the availability of injunctive relief to prevent serious injuries in a variety of contexts. In *Purvis v. Ponte*, 929 F.2d 822, 825 (1st Cir. 1991), it was reiterated that a prisoner need not wait to be physically assaulted before being able to seek relief. *Accord Walsh v. Mellas*, 837 F.2d 789, 797-98 (7th Cir.), *cert. denied*, 486 U.S. 1061 (1988). In *Glick v. Henderson*, 855 F.2d 536 (8th Cir. 1988), the court stated that inmates would have an Eighth Amendment claim if they faced a "pervasive risk" of contracting the AIDS virus and if prison officials did not "reasonably respond to that risk." *Id.* at 539-40 (internal citation omitted). Inadequate fire safety precautions have also been recognized as a possible Eighth Amendment violation. *Hoptowit v. Spellman*, 753 F.2d 779, 783-84 (9th Cir. 1985); *Dimarzo v. Cahill*, 575 F.2d 15, 18 (1st Cir. 1978)(one-"need not wait for the conflagration before concluding that a real and present

threat exists")(footnote omitted); *Shrader v. White*, 761 F.2d 975, 978, 984-86 (4th Cir. 1985).

In other cases too, the appeals courts have recognized that a condition of confinement can rise to the level of an Eighth Amendment violation even if the adverse impact is not felt immediately. Thus, prisoners have been allowed to litigate claims of inadequate lighting, *Hoptowit v. Spellman*, *supra*, 753 F.2d at 783; *Bono v. Saxbe*, 620 F.2d 609, 617 n.12 (7th Cir. 1980), as well as lack of exercise, *Davenport v. DeRobertis*, 844 F.2d 1310, 1315-16 (7th Cir. 1988); *French v. Owens*, 777 F.2d 1250, 1255-56 (7th Cir. 1985). *See also Todaro v. Ward*, 565 F.2d 48, 51 (2d Cir. 1977) (duty to epileptic prisoner begins before inmate chokes on tongue).

This is consistent with *Hutto v. Finney*, which upheld an injunction barring prison officials from confining prisoners to the isolation cell for more than 30 days. In so doing, the Court recognized that some conditions found in a prison may be tolerable "for a few days," but would be "intolerably cruel [if continued] for weeks or months." 437 U.S. at 687. Another illustration is provided by *Spain v. Procunier*, 600 F.2d 189, 199 (9th Cir. 1979), cited with approval in *Wilson v. Seiter*, *supra*, 111 S. Ct. at 2327, which declined to hold that a lack of outdoor exercise was *per se* unconstitutional, but did hold that confinement indoors without exercise for four years was not permissible.

These cases thus indicate that certain conditions, which might be tolerable for a day, a week, a month or even longer without rising about the "routine discomfort" level, at some point, however, constitute a sufficiently serious deprivation which is recognized by the Eighth Amendment. In none of the cited cases was there any proof of immediate, actual harm, yet the courts routinely recognized that the Eighth Amendment was not limited to situations where serious injury is immediately felt, but protects as well against the risk of at least some serious future harms as well.

As we will develop in more detail in part D below, this point has considerable applicability here. Allowing a single puff of cigarette smoke to be inhaled by an otherwise healthy, nonsmoking prisoner would surely not be an Eighth Amendment

violation, but evidence of indifference to a constant exposure at levels that pose an unreasonable risk of serious injury would be another matter entirely. And that brings us to one final category of situations in which the appellate courts have recognized that an Eighth Amendment claim would lie, even though the serious health effects are latent or not otherwise immediate, namely, exposure to environmental hazards.

In *Powell v. Lennon*, 914 F.2d 1459 (11th Cir. 1990), the court allowed a prisoner to bring an Eighth Amendment claim for injunctive relief based on his placement in a cell containing asbestos. The court saw the issue as indifference to a serious medical need and rejected the notion that the prisoner had to become seriously ill before he could sue. *Id.* at 1464. The fact that the "plaintiff was requesting preventive treatment in asking to be placed in an asbestos-free environment does not make his medical need not to breath[e] asbestos any less serious." *Id.* at 1464 n.10.

This approach makes considerable sense. Were the law otherwise — if prisoners who lived and worked in asbestos-lined surroundings could not seek preventive relief — they would be susceptible to diseases which do not manifest themselves immediately, but which could subject the prisoner to an "unnecessary and wanton infliction of pain." Asbestos is classified by the Environmental Protection Agency as a "Group A" (*i.e.*, known human) carcinogen, a classification which ETS will soon share. *See* pp. 6-7, *supra*, and pp. 32-34, *infra*. Exposure to asbestos is associated with asbestosis, a very painful lung disease, as well as mesothelioma, a form of lung cancer. These illnesses generally have latency periods of ten to 25 years from the date of initial contact, because asbestos fibers, once inhaled, remain in the lung, causing a tissue reaction that is slowly progressive and apparently irreversible. Even if no additional fibers are inhaled, tissue changes can continue undetected for decades. Moreover, the effect of asbestosis can be cumulative, as each exposure to asbestos dust can result in additional tissue changes. *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1083 (5th Cir. 1973).

Similarly, in *Clark v. Taylor*, 710 F.2d 4 (1st Cir. 1983), a prisoner who was suspected of killing another prisoner had his

skin involuntarily treated with a chemical called benzidine, in an effort to detect traces of the victim's blood. An expert testified at trial that exposure to benzidine can increase one's risk of developing bladder cancer, although the latency period lasts 14 to 30 years. On that record, the court of appeals held that compelled exposure to this carcinogen violated Eighth Amendment standards and upheld an award of compensatory and punitive damages, despite what the State here would regard as a lack of present injury.

Finally, in *Johnson-El v. Schoemehl*, 878 F.2d 1043 (8th Cir. 1989), the court held that a Fourteenth Amendment claim would lie based on allegations by prisoners in a city jail that they were exposed to a twice-a-week spraying of pesticides and were given no masks or protective clothing, even though the sprayers were so attired. Once again, there was apparently no claim that this exposure caused the prisoners any present injury, but the court of appeals remanded for further factfinding. *Id.* at 1054-55.

The state of the law in this area, at least as it is reflected in the fairly uniform set of federal appellate rulings discussed here, was well summarized by the Third Circuit, which rejected a similar claim that the Eighth Amendment permits a challenge only to "actual health problems." As that court put it — and this responds to the State's citation of the Tenth Circuit opinion in *Clemmons v. Bohannon* — there is nothing in this Court's jurisprudence which suggests that certain conditions do not "fall below constitutional standards merely because there has not yet been an epidemic of typhoid fever, an outbreak of AIDS, a deadly fire, or a prison riot." *Tillery v. Owens*, 907 F.2d 418, 428 (1990).

We recognize, of course, that these lower court decisions are not binding on this Court, but we offer them for their persuasive qualities. Moreover, they are faithful to the statement in *DeShaney* identifying "reasonable safety" as a "basic human need" which the Eighth Amendment protects, as well as *Hutto* and *Rhodes*, which suggest that injunctive relief is available to secure reasonable safety even if one has not yet been assaulted, electrocuted, burned in a fire, or infected with a contagious disease.

We recognize too that not every complaint of possible future injury is enough to make out a violation of the Eighth Amendment's objective component. That is why we have argued throughout this discussion that the objective protections of the Eighth Amendment are held applicable only to unreasonable risks of serious harm. The concept of "serious" harm is taken from the "serious" medical needs standards adopted in *Estelle* and is designed to coincide with this Court's teachings that the Eighth Amendment covers only "basic human needs" and is not intended to be a shield against complaints of "routine discomfort." *Hudson v. McMillian*, *supra*, 112 S. Ct. at 1000. For the same reason, we suggest the coverage of only "unreasonable" risks, to distinguish them from purely conjectural or unrealistic possibilities.

Before leaving this point, we note that the Solicitor General does not go as far as the State or its state *amici* in seeking to limit the Eighth Amendment to cases of present injury. His brief agrees with us that *Hutto v. Finney* stands for the proposition that the Eighth Amendment "plainly bars prison officials from housing an inmate with others who have a serious and readily contagious disease, even though it has not yet been transmitted." U.S. Br. at 19. He also concedes the possibility of situations in which exposure to toxic or other substances "would present a risk of sufficient likelihood or magnitude — and in which there is a sufficiently broad consensus that exposure of *anyone* to the substance should therefore be prevented — that Eighth Amendment protections would be triggered, even though the effects of the exposure would not manifest themselves for some time." *Id.* (emphasis in original).

The Solicitor General nonetheless urges reversal on the theory that, however such a category of conditions may be defined, exposure to secondary cigarette smoke cannot reasonably be included in it, despite its "significan[ce] from a public health perspective." U.S. Br. at 16. The reason, we are told, is that the possibility of any one inmate suffering as a result of such exposure is too "speculative," and the circumstances of his exposure "may vary widely over time and among inmates." *Id.* If this argument is based on the proposition that there is no factual predicate to support Mr. McKinney's claim, then this case is not in a posture to let the

Court decide what the evidence shows because there has been no trial on that issue, and, in addition, as we explain in Part D, there is a substantial body of scientific support for Mr. McKinney's position.

But if the contention is based on an assumption that Mr. McKinney cannot seek relief because he is not now suffering from a illness associated with ETS exposure and may never contract any such illness in the future, the argument is wrong as a matter of law. Thus, although not everyone who is exposed to secondary cigarette smoke will contract lung cancer or heart disease, the same can be said of other hazards which the lower courts have explicitly recognized as falling within the ambit of possible Eighth Amendment protections. In the event of a prison fire, for example, some prisoners might die, while others might escape uninjured; some might suffer third degree burns, others only minor smoke inhalation. From the standpoint of any individual prisoner, the risk of injury during a prison fire is (to use the Solicitor General's formulation) "speculative," and the extent of inmate injuries may "vary widely." Nonetheless, the lower courts have routinely held that inadequate fire safety precautions fall within the purview of the Eighth Amendment. Similarly, while everyone who is exposed to asbestos does not automatically contract asbestosis or mesothelioma, the case law does not suggest that no claim will lie because some prisoners might escape the ravages of those diseases.

While the Solicitor General's argument may seem more appealing than the absolutist position taken by the State and the other *amici*, in practice, it would recognize an Eighth Amendment protection only in those cases where a prison population was exposed to universally lethal materials such as plutonium, while still allowing an "unnecessary and wanton infliction of pain" on inmates whose only fault is that they cannot predict with certainty that they will be the ones ultimately afflicted with a serious, perhaps fatal, disease as a result of their exposure to asbestos, pesticides, or other environmental or similar hazards. Such a result is inconsistent with the requirement in *DeShaney* and similar cases of "reasonable safety" for all prisoners.

In sum, then, we ask the Court to reaffirm what is implicit in its own rulings and explicit in the lower court rulings, namely, that exposure to a condition which poses an unreasonable risk of serious harm is cognizable under the Eighth Amendment's objective component, even if the complaining prisoner has not yet died or been stricken with a serious illness. [7]

D. A Prisoner's Complaint of Compelled Exposure To Secondary Cigarette Smoke At Levels Posing An Unreasonable Risk to His Health States a Claim For Relief Under the Eighth Amendment.

We turn now to the question of whether compelled exposure to secondary cigarette smoke can be said to pose the type of unreasonable risk that would allow a prisoner to challenge his exposure in the same way that the cited cases indicate that he can challenge an unreasonable risk of serious harm from exposure to contagious diseases, inadequate fire safety precautions and other hazardous situations. In analyzing this issue, it is crucial to recall the procedural posture of this case, specifically, the fact that the magistrate dismissed Mr. McKinney's claim as a matter of law without considering any evidence on this claim. Thus, dismissal of that claim can be upheld only if it can be said "beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

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[7] The Solicitor General and the state *amici* cite in passing *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992), for the proposition that present (or at least imminent) "injury in fact" is required to have standing to sue under Article III. U.S. Br. at 18; Hawaii Br. at 6. To this we respond that the injury-in-fact is the present exposure to hazardous conditions, such as the 43 carcinogens which are contained in cigarette smoke and which a non-smoker may be forced to inhale (Pet. App. C14). A prisoner who inhales carcinogens through his nose, whether from asbestos fibers or tobacco smoke, has suffered a physical affront, no less than a prisoner who receives a punch in the nose. *See Hudson v. McMillian*, *supra*, 112 S. Ct. at 1001.

Also, the injury issue in *Lujan* arose at the summary judgment stage while here, the claim was, in effect, dismissed on the pleadings. The closer analogy would thus be to *Students Challenging Regulatory Agency Procedures v. United States*, 412 U.S. 669 (1973), where allegations of injury, even if attenuated, may survive dismissal, regardless of what the plaintiff can eventually prove on the merits.

The State did not attempt to make such a showing before the magistrate. The court of appeals cited various scientific authorities to buttress its conclusion that dismissal of an ETS exposure claim cannot be dismissed under *Conley*, but the State's brief does not respond to those points, preferring instead to rest its claim for reversal on the legal theory that the Eighth Amendment does not, as a matter of law, ever afford a prisoner any relief from compelled exposure to ETS, unless apparently the prisoner is presently complaining about the effects of emphysema or a similar condition which ETS exacerbates.

Thus, if the Court should agree with us that cases such as *Hutto v. Finney* and *Rhodes v. Chapman* do recognize the existence of an Eighth Amendment protection for serious, latent injuries, then the proper course is to affirm the judgment and let the parties resolve the dispute about the nature of the risks from ETS before the trial court. The court of appeals correctly recognized that, whatever the outcome may be on the merits, one should avoid reaching any conclusions on the basis of the pleadings alone. Rather, the parties should be allowed to develop a factual record before the magistrate, who is best equipped to sort out this highly factbound dispute in the first instance.

Even though the State does not cite any authorities to rebut the scientific authorities cited by the court of appeals, we note that the overwhelming weight of scientific evidence — including that developed since the court of appeals first ruled in this case — indicates that compelled exposure to ETS can be very hazardous indeed. In the discussion which follows we discuss some of that evidence, both to indicate that dismissal of Mr. McKinney's claim under *Conley*, or for that matter on a motion for summary judgment, would be unwarranted and to indicate the sort of showing that he could make on remand, particularly if an environmental toxicologist is able to offer expert testimony on his behalf. In addition, as we also demonstrate, societal attitudes have evolved to the point that compelled exposure to ETS is barred in many settings. We discuss each point in turn below.

1. *Current Scientific Evidence*. The State argues, apparently as a matter of law and without regard to what the facts may be,

that the level of pain or deprivation which might be caused by exposure to ETS is simply not sufficient to constitute a violation of the objective component of the Eighth Amendment. Pet. Br. at 26. In deciding that a reasonable factfinder might reach a contrary conclusion, the court of appeals cited various reports by federal agencies, including a 1986 Surgeon General's report which concluded that exposure to ETS is a cause of lung cancer and that acute and chronic respiratory diseases have been linked to ETS (Pet. App. C16-18). U.S. Dep't of Health and Human Services, Report of the Surgeon General, *The Health Consequences of Involuntary Smoking (1986)*("1986 Surgeon General Report"). The court also cited a 1990 draft report released by the Environmental Protection Agency which concluded that ETS is causally associated with lung cancer in non-smoking adults; that ETS should be classified as a Group A (known human) carcinogen according to EPA's guidelines for carcinogen risk assessment; and that approximately 3800 lung cancer deaths per year among non-smokers (both those who never smoked and those who formerly did) can be attributed to ETS (Pet. App. C18-C19). EPA, *Health Effects of Passive Smoking: Assessment of Lung Cancer and Respiratory Disorders in Children (External Review Draft), reported at* 55 Fed. Reg. 25,874 (1990).

Authorities of this sort are surely sufficient to warrant a conclusion that this case should not have been dismissed on the pleadings. If anything, the level of knowledge about the hazards associated with ETS has advanced considerably since the court of appeals rendered that decision. The 1990 EPA draft report has been superseded by a May 1992 draft, which again called for classifying ETS as a Group A carcinogen. The draft report found that it could say with confidence that ETS causes 3000 lung cancer deaths among non-smokers each year, and it associated ETS with a number of other respiratory problems. EPA, *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders (Review Draft)* 1-4, 1-5 (May 1992). In July 1992, EPA's Scientific Advisory Board agreed with the conclusions, and the Administrator is expected to approve a slightly revised version of this report by year's end. "Secondhand Tobacco Smoke Is Called a Carcinogen by EPA Review Board," *The Wall Street Journal* A3 (23 July 1992).

To put these figures in context, it may be useful to compare a non-smoker's risk of death by lung cancer as a result of exposure to ETS with the risk of dying by cancer as a result of exposure to the other Class A carcinogens which EPA regulates as hazardous air pollutants, such as benzene, asbestos, or arsenic. A 1990 study by two government scientists included the following table, which compares the number of cancer deaths annually from ETS and other indoor and outdoor pollutants:

Comparison of Estimated Cancer Deaths (CDs) from Various Airborne Carcinogens in the U.S.

Indoor pollutants	
Environmental tobacco smoke (homes and workplaces)	5000 CDs/yr
Radon gas in homes (non-smokers only)	4000 CDs/yr
Outdoor pollutants	
Asbestos	15 CDs/yr
Vinyl chloride	< 27 CDs/yr
Airborne radionuclides	17 CDs/yr
Coke-oven emissions	< 15 CDs/yr
Benzene	< 8 CDs/yr
Arsenic	< 5 CDs/yr

Repace and Lowrey, "Risk Assessment Methodologies for Passive Smoking-Induced Lung Cancer," 10 *Risk Analysis*, No. 1, at 27, 35 Table II (1990) (footnote omitted). *See also* Repace, "Passive Smoking Is Risky," 44 *J. Am. Med. Women's Ass'n*, March/April 1989, 50, 53 (estimating 30 percent increase

in a non-smoking wife's risk of lung cancer death based on exposure to husband's cigarettes). [8]

Apart from this evidence about how ETS can cause lung cancer and other respiratory problems, recent evidence also shows that the link between ETS and heart disease can lead to many more excess deaths each year. A study published earlier this year in the *Journal of the American Medical Association* estimated, on the basis of current epidemiological data, that exposure to ETS accounts for 35,000 to 40,000 deaths from heart disease annually among people who never smoked and those who formerly smoked, which is roughly 12 to 13 times as many deaths as are associated with lung cancer among the same population. Steenland, "Passive Smoking and the Risk of Heart Disease," 267 *J. Am. Med. Ass'n* 94 (January 1992); *see* also Glantz and Parmley, "Passive Smoking and Heart Disease," 83 *Circulation*, January 1991, 1.

According to the *JAMA* study, an individual male never-smoker who lives with a current or former smoker is estimated to have a 30 percent higher risk of death by ischemic heart disease by the age of 74 than a male never-smoker who lives with a non-smoker and is exposed to what is referred to as "background" (*i.e.*, normal, day-to-day) exposure to ETS. *Id.* at 95, 98-99. To put the dimensions of this problem in starker terms, the study notes that EPA and the Food and Drug Administration regulate environmental limits for toxins if there is a one in 100,000 or one in 1,000,000 lifetime risk of an excess death based on exposure to a carcinogen. By contrast, the increased risks of death from ischemic heart disease based on exposure to ETS are as high as one to three per 100. *Id.* at 98.

Thus, the risks associated with ETS may be 10,000 times above the levels which prompt these federal regulatory agencies

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[8] Copies of these and other scientific papers cited in the brief are being lodged with the Clerk for the Court's convenience. The estimate of 5000 lung cancer deaths among non-smokers annually was based on data available at the time, whereas EPA now pegs the annual fatality rate at 3000. Even with that lower figure, however, the relative risks of ETS exposure to non-smokers are far greater than the *combined* total risks from all the listed carcinogenic outdoor air pollutants which EPA regulates under the Clear Air Act. Repace and Lowrey, *supra*, at 35.

to take remedial action against other carcinogens. If anything, the risks may be even higher in the prison setting of which Mr. McKinney complains both as a general proposition, because of the high percentage of prisoners who smoke, and also in his specific case, given his complaint about confinement in a cell with a five-pack-a-day smoker. The scientific studies identifying the degree of risk faced by a non-smoker living with a smoker implicitly posit that a non-smoker has options which are simply not available to a prisoner, *e.g.*, going to another room or outdoors to avoid ETS. Moreover, the average U.S. cigarette smoker smokes 32 cigarettes per day at a rate of two cigarettes per hour. Repace and Lowrey, *supra*, at 28. By contrast, Mr. McKinney's cellmate smoked five packs or 100 cigarettes a day at a rate of six cigarettes per hour, thus exposing Mr. McKinney to ETS at levels up to three times higher than he would face as a civilian, or as much as a nine in 100 risk of death from ischemic heart disease. *See* Steenland, *supra*, at 98.

Apart from these comparisons, the risk at issue here is also of a far greater magnitude than the risks that are regulated by the Occupational Safety and Health Administration, which is responsible for promulgating standards "which most adequately assure[], to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity." 29 U.S.C. § 655(b)(5). In construing that mandate, this Court has suggested that a risk of one excess cancer death per 1000 exposed workers might well be "significant" and should therefore, if feasible, be eliminated by regulation. *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 655 (1980). Applying that test, OSHA has imposed a number of standards to regulate strictly toxic substances that pose risks of far *lesser* magnitude than those at issue here. *See, e.g., International Union, United Auto Workers v. Pendergrass*, 878 F.2d 389, 393 (D.C. Cir. 1989)(estimates of residual cancer risk to workers from formaldehyde with OSHA standard in place ranged from .0056 to 2.64 per 1000 workers); *Building and Construction Trade Department, AFL-CIO v. Brock*, 838 F.2d 1258, 1265 (D.C. Cir. 1988)(residual risk of mesothelioma death from asbestos exposure on the order of 1.64 per 1000 workers found to be significant); *Public Citizen Health Research Group v. Tyson*, 796

F.2d 1479, 1502 (D.C. Cir. 1986)(residual cancer risks of 1.2 to 2.3 per 1000 workers from exposure to ethylene oxide found to be significant).

Neither the State nor the *amici* offer any evidence to rebut the scientific evidence which the court of appeals cited, nor do they take account of the more recent advances in knowledge about this issue. Indeed, the State simply ignores the issue of scientific evidence and is apparently content to rest its case on the proposition that, however deadly exposure to ETS may prove to be at some future point, the Eighth Amendment simply offers no protections.

For their part, the state *amici* acknowledge the 1986 Surgeon General's report, but nothing more recent. They claim, however, that this report is too "equivocal" or "cautious" to be of any value, citing various passages which indicate the need for better risk assessments and studies of the issue. Hawaii Br. at 10-11. Apart from the difficulty that this argument is one of fact, not of law, the *amici*'s highly selective reading (which makes no mention of the 1990 EPA draft report) is contradicted by the words of the Surgeon General elsewhere in that report. The Surgeon General categorically stated, citing an "abundance of evidence" that "a clear judgment can now be made: exposure to ETS is a cause of lung cancer." 1986 Surgeon General Report at 10. He also specifically responded to the claim that "more research is required," stating that it was his "judgment that the time for delay is past; measures to protect the public health are required now. The scientific case against involuntary smoking as a health risk is more than sufficient to justify appropriate remedial action." *Id.* at xii. *See* Pet. App. C17-C18. [9]

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[9] The 1986 Surgeon General report was a breakthrough in terms of the strength of its scientific conclusions. As the court of appeals noted (Pet. App. C15-C17), previous reports, issued in 1979, 1982 and 1984, found that tobacco smoke can be a significant source of indoor air pollution and can exceed EPA standards for exposure to carbon monoxide, but as late as 1982, no conclusive link between ETS and lung cancer had been shown. By 1984, however, the Surgeon General was able to detect differences in measures of pulmonary function between subjects who are chronically exposed to ETS and those who are not. *See* U.S. Dep't of Health, Education and Welfare, Report of the Surgeon General, *Smoking and Health* (1979); U.S. Dep't of Health and Human Services, Report of the Surgeon General, *The Health Consequences of Smoking: Cancer* (1982); U.S. Dep't of Health and Human Services, Report of the Surgeon General, *The Health Consequences of Smoking: Chronic Obstructive Lung Disease* (1984). Also in 1986 a report by the National Academy of Sciences' National Research Council concluded, as did the Surgeon General, that the scientific evidence, taken as a whole, showed a higher incidence of lung cancer among people exposed to ETS. *Environmental Tobacco Smoke: Measuring Exposures and Assessing Health Effects* 10. *See* Pet. App. C45-C46 n.14.

The Solicitor General takes a somewhat different tack, arguing that the Eighth Amendment cannot be read as covering only speculative injuries (a point we addressed above) and further, that the Amendment merely sets a floor and does not command, for example, that prison diets "conform to the latest medical evidence concerning what foods are best for long-term health." U.S. Br. at 19. Thus, he argues, scientific evidence of an increased risk of heart disease from eating certain foods would "not mean that it is cruel and unusual punishment for prison officials to serve macaroni and cheese instead of broiled fish." *Id.*

The problem with this formulation is that it is long on assertions and short on facts, since the record contains no evidence on the risks posed by either ETS or macaroni and cheese, either individually or on a comparative basis, and, we submit, the Court should not attempt to make a definitive scientific comparison on its own. In any event, the Solicitor General's argument badly misstates the issue presented here. Is he contending that the risks associated with an occasional dinner of macaroni and cheese are in the same league as the risks faced by non-smokers who are forced to live and work in a setting where two-thirds of all inmates smoke, where smoking is allowed in most places, and where one's cellmate in a six by eight foot room smokes five packs of cigarettes a day (or one every ten minutes, assuming eight hours of sleep)? Is he suggesting that the Food and Drug Administration regards macaroni and cheese as posing the same degree of risk as a Group A carcinogen? In the absence of any factual proof on this point, the comparison is apt only if one assumes that ETS has been proven to pose no greater risk to one's health than

does macaroni and cheese and that prisoners are exposed to a forced diet of macaroni and cheese (with no alternatives) to the same extent that non-smoking prisoners are exposed to ETS in the circumstances of which Mr. McKinney complained.[10]

Thus, whatever application the Eighth Amendment may have to other risks, the State's contentions do not apply here, where there is constant exposure to an ambient, airborne carcinogen and when the available evidence suggests that the risks of dying from heart disease or lung cancer as a result of compelled exposure to ETS far exceed the levels which our society will tolerate with respect to other airborne carcinogens. In making this point, we are not asking the Court to endorse the conclusions set forth in these studies; we present them only as an indication of the type of showing which Mr. McKinney would make if the case is remanded to district court and to show that there is substantial evidence that the risk posed by compelled exposure to ETS can constitute a violation of the objective component of the Eight Amendment. Differently put, in order to overturn the judgment below and rule for the State at this stage of the case, the Court must conclude that the Eighth Amendment affords no protection whatsoever against hazards which can be controlled by prison officials and threaten as many as three in every 100 inmates (maybe more) with the risk of dying an unnecessary and painful death.

2. *Current Societal Attitudes*. Apart from this scientific evidence, it is also appropriate to consider the condition which Mr. McKinney challenges in light of evolving societal attitudes. Such an inquiry is consistent with this Court's observation last Term that the objective component of an Eighth Amendment claim is "contextual and responsive to contemporary standards of decency," *Hudson v. McMillian*, *supra*, 112 S. Ct. at 1000

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[10] The Solicitor General does not, however, take the view that feeding prisoners a diet which is completely lacking in nutritional value, or which perhaps subjects them to the risk of diseases such as scurvy or rickets, would be permissible. *Cf. Hutto v. Finney, supra*, 437 U.S. at 683 & n.7 (a condition which contributed to the Eighth Amendment violation there was feeding prisoners less than 1000 calories a day, with meals consisting primarily of four-inch squares of "grue," a substance created by mashing meat, potatoes, oleo syrup, vegetables, eggs, seasoning it into a paste and baking it in a pan).

(internal quotation omitted), and *see* cases collected at p. 19, *supra*. "The clearest and most reliable objective evidence of contemporary values is the legislation enacted by this country's legislatures," *Penry v. Lynaugh*, *supra*, 492 U.S. at 331, and the focus is on the standards accepted by "modern American society as a whole." *Stanford v. Kentucky*, *supra*, 492 U.S. at 369 & n.1. *See also id.* at 371 (looking to "degree of national consensus" on a given issue); *accord Thompson v. Oklahoma*, 487 U.S. 815, 849 (1988)(O'Connor, J., concurring).

As the court of appeals noted, there are many legislative enactments reflecting the prevailing contemporary view in favor of limiting compelled exposure to ETS in a number of settings. These include a federal law which bans cigarette smoking on virtually every domestic flight, 49 U.S.C. App. § 1374(d)(1), which may be an apt comparison here, as airline passengers have no more freedom than prisoners to avoid unwanted cigarette smoke. Smoking is also forbidden on interstate intercity bus trips, 49 C.F.R. § 1061.1 (1991), and federal rules control smoking in facilities owned by the General Services Administration. 41 C.F.R. § 101-20.105.3 (1991). In addition, the Bureau of Prisons has banned smoking in many areas of federal prisons, 28 C.F.R. § 551.160 (1991); prison officials must, "[t]o the extent practicable," place non-smoking inmates in non-smoking quarters, and double celling of smokers with non-smokers "will be "avoided except where impractical due to circumstances, and then may be done only for limited duration." *id.* at § 551.162. *See* Pet. App. C27-C28). [11]

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[11] As a counter-indication, the state *amici* note (at 12-13) that OSHA rejected an emergency rulemaking petition to have ETS regulated as a "grave danger," and the District of Columbia Circuit affirmed in an unpublished opinion. Neither fact has any consequence here. An "emergency temporary standard" is designed to remedy hazards so "grave" that the rule may be issued without notice and comment and may take effect immediately upon publication in the Federal Register; the emergency standard can remain in effect for no more than six months, at which point it must be superseded by the final rule. 29 U.S.C. § 655(c)(1). However, the power to issue emergency standards is to be used only in "limited situations," given the "extraordinary power" which the statute confers upon OSHA; that power should be "delicately exercised" and used only as "an unusual response to exceptional circumstances." *Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1155 (D.C. Cir. 1983) (internal citations omitted). If anything, OSHA's recent

With respect to enactments at the state and local level, the court of appeals noted that, as of 1987, 45 states and the District of Columbia had passed laws regulating tobacco use. Pet. App. C26, *citing Avery v. Powell*, 695 F. Supp. 632, 640 (D.N.H. 1988), *citing in turn* Note, "An Overview of Current Tobacco Litigation and Legislation," 8 *U. Bridgeport L. Rev.* 133, 175-82 (1987)(compiling state statutes). The court added that, as of May 1990, county and state correctional departments in 13 states had banned smoking or were considering such a ban and that the American Jailers Association had passed a resolution on behalf of 6500 jail administrators in favor of a ban on inmate smoking (Pet. App. C28). [12]

A recent article in the *Journal of the American Medical Association* helps quantify the extent to which state and local laws provide protections from compelled exposure to ETS. Rigotti and Pashos, "No-Smoking Laws in the United States: An Analysis of State and City Actions to Limit Smoking in Public Places and Workplaces," 266 *J. Am. Med. Ass'n* 3162 (December 1991). The authors conducted a survey of no-smoking laws adopted by states and by cities with a population of 25,000 or greater, and the findings are revealing because they indicate a "national consensus" in favor of at least some limitations on unwanted exposure to ETS.

At the state level, the study found that, by the end of 1989, "all but six states had adopted some restriction on smoking in

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request for data about ETS as a prelude to regulating exposure in the workplace is an indication of the importance which OSHA attaches to addressing hazards of ETS. *See* 56 Fed. Reg. 47,892-93 (1991).

[12] In citing this last item, we acknowledge the Court's point that legislative enactments are given primacy in measuring current societal attitudes and that reports and resolutions by expert organizations are not conclusive to the extent that they are not embodied in legislative enactments. *See Penry v. Lynaugh*, *supra*, 492 U.S. at 335; *cf. Stanford v. Kentucky*, *supra*, 492 U.S. at 369 n.1 (experience in other countries may be helpful in confirming that historical accident is not the reason for state or local laws which ban a practice in this country). To the extent that the Jailers Association' call for a total ban on inmate smoking implicitly embraces the less sweeping relief sought here, we submit that it confirms the societal attitudes discussed in the text.

public places or workplaces," although these laws varied in comprehensiveness: 35 state laws limited smoking in public places, 22 required no-smoking sections in restaurants, and 12 addressed smoking in private workplaces; ten states had comprehensive no-smoking laws. *Id.* at 3164.

At the local level, over half of the nearly 1000 cities surveyed "had taken some action to limit smoking" as of 1 July 1989, *id.* at 3163, including limits on smoking in government buildings (42% of cities), as well as restrictions on smoking in one to three enumerated public places (such as theaters or stores)(32%), in more than three public places (27%), in restaurants (24%), and in private workplaces (18%); comprehensive laws had been adopted in 165 of the cities (17%). *Id.* at 3164.

These numbers do not reveal the full impact of these laws. According to the study, "Over two-thirds of the nearly 100 million Americans residing in cities with a population of 25,000 or greater were covered by some type of local smoking restriction, and over one third lived in cities with comprehensive no-smoking ordinances." *Id.* at 3164. These figures are not static. From 1980 until July 1989, there was a tenfold increase in the number of local laws, with two types of laws showing the most growth, *viz.*, comprehensive laws and those covering government buildings; in addition, every year between 1982 and 1988 saw the enactment of more laws than in the previous year (although a decline of new laws was deemed possible in 1989). *Id.*

Not surprisingly, the study found that cities are more willing to adopt smoking restrictions when no state law exists, just as city no-smoking laws are less common in states with comprehensive no-smoking laws. *Id.* at 3166. The study noted too that, by excluding polities with populations below 25,000, it may be understating the extent to which the American population enjoys protections from unwanted tobacco smoke. *Id.* Nonetheless, the study concluded, by combining the available city and state data, that by mid-1989, "nearly all urban Americans were covered by a state or local smoking restriction." *Id.*

To be sure, the data do not indicate a consensus in favor of a comprehensive ban on smoking everywhere in public, but that is not the point. The point is that, at a minimum, there is a remarkable legislative consensus in favor of at least *some* limi-

tation on compelled exposure to ETS where one is likely to come in contact with other people in enclosed spaces. Wherever that line may be drawn, this study suggests a consensus *against* the unrelieved exposure to ETS of which Mr. McKinney complained, *i.e.*, no escape from compelled exposure to ETS in one's living quarters, and compelled exposure to ETS in a community where two-thirds of the population smokes and where smoking is allowed everywhere except the infirmary and dining hall (J.A. 51). [13]

This consensus in favor of some limitation is surely as strong as it was in cases which invalidated state laws using similar comparisons with laws elsewhere. *See Enmund v. Florida*, 458 U.S. 782, 792-93 (1982)(invalidating laws in eight states imposing death penalty on robbers convicted of felony murder; Eighth Amendment protection not limited to cases such as *Coker v. Georgia*, 433 U.S. 584 (1977), where only one state follows challenged practice); *see also Thompson v. Oklahoma,*

[13] By contrast, as the state *amici* note (at 12), approximately 70 percent of all Americans do not smoke. These *amici* try to blunt the force of this fact by arguing that up to 77 percent of the non-smoking workforce is exposed to passive smoke while at work. However, if only 30 percent of the relevant population smokes, the exposure at work alone is likely to be considerably smaller than in the Carson City prison, where two-thirds of the inmates smoke.

The *JAMA* article cited in the text does note two seemingly offsetting trends: (1) the enactment in a few state-wide laws which limit smoking, but do so in a manner which preempts stronger local ordinances, and (2) the enactment of state laws which prevent employers from discriminating against employees who smoke, even where smoking is banned or restricted in the workplace. 266 *J. Am. Med. Ass'n* at 3167. Neither development undermines our point that the legislative trend is strongly in favor of at least some restrictions on unwanted exposure to ETS. The first category of laws reflects a tradeoff under which some smoking restrictions are extended to cover all state residents, although more restrictive local laws are barred. The second reflects a refinement in the law under which employers can be required to limit smoking in the workplace (or ban it entirely), but they cannot take adverse actions against workers who smoke at home or in places outside the workplace where smoking is allowed. *Compare* N.J.S.A. §§ 26:3D-23 and -25 (1987) with N.J.S.A. §§ 34:6B-1 and -2 (1992 Supp.).

supra, 487 U.S. at 849-51 (O'Connor, J., concurring); *compare Stanford v. Kentucky*, *supra*, 492 U.S. at 371-72. [14]

Neither the State nor its *amici* come to grips with these points. Instead, the State offers the generalization that ordinary citizens have no right to be free of tobacco smoke, Pet. Br. at 26, but, as the foregoing discussion suggests, there is a growing consensus which opposes unlimited exposure to ETS, even among people who may face less of a risk and enjoy more mobility than do individuals such as Mr. McKinney. As to the Solicitor General's claim that forced exposure to ETS is just part of the price one pays for being convicted of a crime, U.S. Br. at 22, the severe hazards associated with such exposure, as outlined in the previous section, take ETS out of the realm of the "routine discomfort" or inconvenience that must be tolerated as part of prison life. *Hudson v. McMillian*, *supra*, 112 S. Ct. at 1000.

The Solicitor General also posits that no Eighth Amendment violation can occur because smoking is a habit deeply rooted in our history and that we have "effectively chosen to accept the considerable risks that result from individual choices, to smoke, including the secondary effects of smoking on non-smokers." U.S. Br. at 20. This claim ignores the sea change in public attitudes towards involuntary exposure to ETS, as evidenced by the cited discussion of state and local laws on this issue. Nor are historic attitudes a helpful guide here: Asbestos "has been known to man since ancient times," *Borel v. Fibreboard Paper Products Corp.*, *supra*, 493 F.2d at 1083 n.3, *and see id.* at 1083-85, but in recent decades at least, one would be hard pressed to argue that society willingly accepts the risks of exposure to asbestos or that the consequences of such exposure

[14] The Nevada legislature responded to the first appellate ruling in this case by amending its law barring smoking in "public buildings" to exempt facilities used to house or serve inmates (Pet. App. F1, F7). That change does not affect the analysis here because a legislative determination that smoking should not be banned entirely cannot be equated with a legislative endorsement of virtually unlimited exposure to secondary cigarette smoke. And in any event, Nevada prison authorities have adopted a policy designed to limit smoking in Nevada prisons.

are merely a "routine discomfort" of the sort which must be endured as part of a criminal sentence. [15]

Under *DeShaney* and *Youngberg*, the fact that civilians may willingly expose themselves to hazards does not mean that prison officials may expose those entrusted to their custody to the same conditions. As the dissenting judges observed in *Clemmons v. Bohannon*, *supra*:

> [T]he fact that people who are free to do so choose to expose themselves to serious health risks cannot justify the arbitrary, involuntary exposure of a prisoner to those risks. It would be absurd to suggest that because people ride with drunk drivers, practice bungee jumping, sky-dive, and ride motorcycles without helmets, a prison official could therefore require an inmate to do so over his objection.

956 F.2d at 1533 n.3 (Seymour, J., dissenting).

Finally, the State and the Solicitor General argue that laws which regulate exposure to ETS, without banning smoking outright, reflect an effort to balance competing needs and that, in a prison context, any proposed limits on smoking would have to weigh considerations of security, morale and other issues of prison administration. Pet. Br. at 19-20; U.S. Br. at 21-22. Once again, we object to any effort to engage in a balancing of evidence when there is none in the record which can be balanced. Moreover, any balancing of exposure to a known carcinogen against whatever competing interests may be cited

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[15] It is also suggested that an Eighth Amendment violation cannot be found in this context when "[t]wo hundred years ago, many of our most revered founding fathers were tobacco farmers." U.S. Br. at 24, *quoting Caldwell v. Quinlan*, 729 F. Supp. 4, 6 (D.D.C.), *aff'd mem.*, 923 F.2d 200 (D.C. Cir. 1990), *cert. denied*, 112 S. Ct. 295 (1991). *See also Steading v. Thompson*, *supra*, 941 F.2d at 500. This Court has made it clear, however, than in an Eighth Amendment context, it is not bound by what may have been regarded as enlightened policy in 1789, *see* p. 19, *supra*, even though the Court has looked to contemporary practices in interpreting other Amendments. *E.g.*, *Marsh v. Chambers*, 463 U.S. 783 (1983). Also, we doubt that the founding fathers would have been indifferent to a hazard which science later proved to be less benign than was once thought, but to cause over 30,000 needless deaths each year.

should be carried out during the inquiry as to whether the subjective component of an Eighth Amendment violation has been established, an inquiry that is analytically distinct from the question presented by this case, which is whether a particular condition or situation is, objectively speaking, severe enough to be a possible Eighth Amendment violation. The question of *why* prison officials may choose to tolerate a particular hazard is entirely separate from the question of *whether* that hazard is harmful enough to warrant the protections of the Eighth Amendment. Since only the latter issue is now before the Court, the argument of the State and the Solicitor General is irrelevant.

CONCLUSION

Because of the recent developments in this case, we respectfully suggest that the writ should be dismissed. On the merits, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

Cornish F. Hitchcock
(Counsel of record)
Alan B. Morrison

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Attorneys for Respondent

October 1992

APPENDIX

STATE OF NEVADA
DEPARTMENT OF PRISONS
OFFICE OF THE DIRECTOR

MEMORANDUM

DATE : January 10, 1992

TO: ALL WARDENS AND MANAGERS
FROM: RON ANGELONE, DIRECTOR
SUBJECT: SMOKING POLICY

ADMINISTRATIVE DIRECTIVE # 53-92
(supersedes A.D. 24-91)

Smoking in program, food preparation/serving, recreational and medical areas is restricted to those areas specifically designated for that purpose. These areas include, but are not limited to, classrooms, libraries, gymnasiums, chapels, culinary's, industries and infirmaries.

Smoking by inmates and/or staff is strictly prohibited during meetings (i.e., staff meetings, training, inmate treatment groups) and during individual inmate counseling/treatment sessions, medical and/or mental health encounters. Employees/inmates are not allowed to smoke in offices shared by others unless every individual in the office agrees to allow smoking.

It is the responsibility of the respective Wardens to designate smoking areas for staff and inmates, consistent with the requirements outlined above. The Assistant Director/Support Services, with the approval of the Director, shall designate smoking areas in Central Office-North. The Assistant Director/Prison Industries, with the approval of the Director, shall designate smoking areas in Central Office-South.

Contingent upon space availability, Wardens may further designate non-smoking sections in inmate dormitory settings. Reasonable efforts may be made by the institutional classifi-

cation committees to accommodate non-smokers in double bunked housing areas. Non-smoking inmates who wish to be housed with another non-smoking inmate are to provide a written request to the Associate Warden Programs/Facility Manager. As with any incompatible inmate living situation, accommodations will be as necessary, consistent with security considerations and space availability.

/s/ Ron Angelone

Ron Angelone, Director
NEVADA DEPARTMENT OF PRISON

INMATE ACCESS
YES: xx
NO:

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

WILLIAM McKINNEY,	)	Case No.
	)	CV-N-87-36-ECR
Plaintiff,	)	
	)	
vs.	)	**MOTION FOR**
	)	**SUBPOENA TO**
PAT ANDERSON, et al.,	)	**PRODUCE AN**
	)	**EXPERT WITNESS**
Defendants.	)	**AT TRIAL**

Comes Now, William McKinney, plaintiff in Pro Se, and moves this court, pursuant to Fed. R. Civ. P. Rule 45 (A), (b), (c), (E), and F.R.C.P. Rule 26(b)(4) *et seq.*, for an order securing an expert witness at his trial set to commence on September 22nd, 1987.

That this motion is made and based upon all the motions, affidavits, pleadings and the verified civil rights complaint on file in the above-entitled court.

For cause of said motion plaintiff shows *viz*:

1. That it is *important* to his case that the court issue a subpoena for one or all of the following persons:

(A) *The Surgeon General*, expert on cigarette smoking;

(B) A representative from *Action on Smoking & Health*;

(C) *National Interagency Council on Smoking & Health*, representative;

(D) A representative from the Food & Drug Administration.

2. Any of the above-named representatives is an authority on the effects cigarette smoking would have on a non-smoker housed in close confines with a heavy cigarette smoker.

DATED this 19 day of August 1987.

Respectfully submitted

By /s/ William McKinney
WILLIAM MCKINNEY

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WILLIAM McKINNEY,	)	
	)	
Plaintiff,	)	Case No.
	)	CV-N-87-36-ECR
vs.	)	
	)	
PAT ANDERSON, et al.,	)	**ORDER**
	)	
Defendants.	)	

Pending in the above-entitled matter are plaintiff's Motion for Subpoena to Produce Expert Witnesses (court docket #14A) and Petition for Writ of Habeas Corpus Ad Testificandum (court docket #14B) both filed August 21, 1987. The pleadings arose from plaintiff's attempt to secure witnesses to testify at a combined hearing on plaintiff's Motion for Preliminary Injunction and trial on the merits which had been set for September 22, 1987 but vacated on defendants' motion to allow consideration of their Motion for Summary Judgment.

Strictly speaking, the motions are moot; however, a report and recommendation is being entered recommending that defendants' Motion for Summary Judgment be denied. If the District Court issues its order adopting the recommendation, plaintiff may be expected to renew his requests. A ruling on these requests should expedite and clarify the evidentiary situation for the parties.

Plaintiff's motion for a subpoena to produce an expert witness at trial requests the court to issue a subpoena for one or all of the following: (1) the Surgeon General of the United States; (2) a representative from Action on Smoking and Health; (3) a representative from the National Interagency Council on Smoking and Health, and/or (4) a representative from the Food and Drug Administration.

Apparently plaintiff intends for the court to locate and procure one or more of these officials to provide testimony for

him. He had not provided any information on where such individuals may be found or cited authority to show the court has jurisdiction to take such action. He does not indicate he has communicated with any such person so that he has any idea about their competence or ability to testify about his individual circumstances, etc. Thus, he is also asking the court to pick witnesses for him.

The choosing and obtaining of witnesses for a party is that party's responsibility and in a civil case the paying of witness fees, transportation costs and the like also become that party's responsibility and not the court's or the opposing party's duty. This is so even for plaintiffs who have been allowed to file *in forma pauperis*. Further, a subpoena for a hearing or trial must be served within the district or if outside the district within 100 miles of the place of the hearing or trial. Fed.R.Civ.P. 45(e)(1). The court suspects these persons may be outside that area and therefore not subject to its subpoena power.

Plaintiff has not shown the court that it has the authority to grant what he requests. He might consider attempting to find a local expert witness from the state university medical school or finding authoritative writings upon the subject he wishes to present. *See* for example Fed. R. Evid. 803(8) and (18). Whatever he may decide the presentation of his evidence is his responsibility.

Plaintiff's Petition for Writ of Habeas Corpus Ad Testificandum requests the court issue a writ to have prison officials make present for testimony some six inmate witnesses who apparently have been roommates or friends of plaintiff and who have heard him complain about the effects of tobacco smoke on him, etc.

The practice in this district is that when a matter is ready for trial in a civil case involving an inmate plaintiff, the court (without a petition for writ of habeas corpus) orders the defendants' counsel (who is a Deputy Attorney General) to have present for trial plaintiff and any of plaintiff's witnesses who are employees or inmates of the Nevada Department of Prisons. This does not mean that the court will order that all inmates or employees requested be present. The court will require that the plaintiff specify the particular testimony of

each witness and why he or she is needed. The court will not order the presence of individuals whose testimony will be repetitious or duplicative of other expected witnesses or documentary evidence. Plaintiff should also consider that he himself should be able to testify to most if not all of the areas he has stated he expects his requested inmate witnesses to testify to. As set forth above, all of the other witnesses listed by plaintiff must be obtained through the usual subpoena process which requires plaintiff to tender the witness fee.

Good cause appearing therefor,

IT IS HEREBY ORDERED that:

1. Plaintiff's Motion for Subpoena to Produce Expert Witnesses (court docket #14A) filed August 21, 1987 is *denied*; and

2. Plaintiff's Petition for Writ of Habeas Corpus Ad Testificandum (court docket #14B) filed August 21, 1987 is *denied*.

DATED this 8th day of APRIL, 1988.

/s/ Phyllis Halsey Atkins
UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

WILLIAM McKINNEY,	)	
	)	Case No.
Plaintiff,	)	CV-N-87-36-ECR
	)	
vs.	)	
	)	**MOTION FOR**
PAT ANDERSON, et al.,	)	**COURT APPOINTED**
	)	**EXPERT WITNESS**
Defendants.	)	

Comes now, the plaintiff William McKinney, in Pro Se, moves this Honorable Court, pursuant to the Federal Rules of Civil Procedure and the Federal Rules of Evidence 706(A), (b) and (d); F.R.E. 702; F.R.E. 703 and F.R.E. 705, for appointment of an expert witness, an environmental toxicologist, to give testimony and evidence at the trial in this matter.

This Motion is made and based upon all the pleadings, papers, motions and the complaint on file in this court.

This motion is further made and based upon the points and authorities attached hereto.

For cause of said motion plaintiff shows *viz*:

(1) That the testimony of an environmental toxicologist is absolute[ly] necessary to clarify the facts in this case for a jury.

(2) Plaintiff has no training as an environmental toxicologist.

(3) Without the testimony of an environmental toxicologist plaintiff cannot prove the effect of a smoker's sidestream smoke upon a nonsmoker.

(4) That plaintiff has contacted an environmental toxicologist by way of letter communication. In his reply to plaintiff's letter, the toxicologist stated as follows:

"Dear Mr. McKinney:

Excuse the handwritten note — I was about to leave town when the Dean sent your letter to me.

I am an environmental toxicologist (trained at the Johns Hopkins Univ.) and have served as an expert witness in alcohol, drug & toxicity trials. My consulting work is not associated directly with the university. My fee is $80/hr.

I'll be happy to discuss your case with you upon my return on 9 (sic) May 88."

(5) Plaintiff is in dire need of this environmental toxicologist's testimony concerning the danger of sidestream cigarette smoke to a nonsmoker's health, but his indigency prevents him from paying the costs and expenses of the said witness:

A. This witness' fee is eighty dollar an hour;

B. This witness will be needed for approximately three (3) hours during the trial and six (6) hours during investigations by plaintiff.

C. This witness will have to travel from Reno Nevada to the Nevada State Prison in order for plaintiff to investigate him.

D. The Department of Prison[s] do[es] not pay for telephone calls to such witness, and plaintiff is only allowed to make collect calls from the prison.

E. This witness will have to do research on issues raised in plaintiff's civil rights complaint, xerox any information discovered and mail it to the plaintiff or bring it to him.

G. The environmental toxicologist is George G. Bierkamper, Ph.D., is Associate Professor at the University of Nevada School of Medicine. His business address is the Department of Pharmacology, Howard Medical Science Building, Reno, Nevada 89557-0056. Telephone Number (702) 784-4118.

Dated this 17 day of May 1988

RESPECTFULLY SUBMITTED

By /s/ William McKinney
William McKinney, In Pro Se

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POINT AND AUTHORITIES IN SUPPORT OF MOTION FOR COURT APPOINTED EXPERT WITNESS

See, F.R.C.P. Rule 26 (b), (4) *et seq*.

Cf. eg., Danville Tobacco Assn. v. Bryan-Buckner Associates, Inc., 333 F.2d 202 (4th Cir. 1964).

It is important that the jury view the expert witness in person to observe his demeanor while he testify [*sic*] to the dangers a nonsmoker risk[s] by being housed in an 8' x 6' room, without ventilation, with a heavy cigarette smoker.

CONCLUSION

Here, plaintiff has shown that he is an indigent prisoner without funds sufficient to cover the expenses of an expert witness who will testify at the trial in this case. The expert witness' testimony is absolute[ly] necessary in trial of this case.

Wherefor[e],

Plaintiff prays that this court appoint an environmental toxicologist as an expert witness for the plaintiff;

That this expert witness be compensated for his participation in trial, discovery research, and travel expenses.

For whatever other relief this court may deem appropriate.

RESPECTFULLY SUBMITTED

By /s/ William McKinney
William McKinney, In Pro Se

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WILLIAM McKINNEY,	)	
	)	
Plaintiff,	)	Case No.
	)	CV-N-87-36-ECR
vs.	)	
	)	
PAT ANDERSON, et al.,	)	**ORDER**
	)	
Defendants.	)	
	)	

This matter is before the court on the plaintiff's motion for a court appointed expert witness (court docket #23). The defendants have not filed a response. The plaintiffs allege that the testimony of an environmental toxicologist is necessary in order to clarify the facts of this case for a jury. (Court docket #23, p. 2). The purpose of such testimony is to show the dangerous effect of a smoker's side stream smoke upon a non-smoker. (Court docket #23, pp. 2-3).

The plaintiff urges that the court may appoint such a witness on the authority of Fed.R.Civ.P. 26(b)(4) and Fed.R. Evid., 702, 703, 705 and 706. Review of these rules reveals that only Fed.R.Civ.P. 26(b)(4) and Fed.R.Evid. 706 concern the payment of fees.

Although initially the plaintiff does not state that this expert witness would testify on the plaintiff's behalf, that appears to be his intention. "This witness will have to travel from Reno to the Nevada State Prison in order for plaintiff to investigate him." (Court docket #23, p. 3). Further, "[tlhis witness will have to do research on issues raised in plaintiff's civil rights complaint, xerox any information discovered and mail it to the plaintiff or bring it to him." (*Id.*) The plaintiff estimates that the witness would be needed for three hours during the trial and six hours during investigations by plaintiff. (*Id.*) Finally, in support of his motion the plaintiff concludes

that "[i]t is important that the jury view the expert witness in person to observe his demeanor while he testify to the dangers a nonsmoker risk by being housed in an 8' x 6' room, without ventilation, with a heavy cigarette smoker." (Court docket #23, p. 4).

The plaintiff misapprehends the nature of Fed.R.Evid. 706. This rule provided for the appointment of an impartial expert. "The court may appoint any expert witnesses *agreed upon by the parties, and* may appoint expert *witnesses of its own selection*." Fed.R.Evid. 706 (emphasis added). The expert's duties are those which the *court* informs him or her in writing.

Thereafter, the expert advises the parties of his or her findings. Each party may depose the expert. At trial the expert may be called to testify by either party or the court. Additionally, the parties may also call their own expert witnesses. Fed.R.Evid. 706(d).

The appointment of experts by the court occurs rather infrequently. Such appointments are not for the benefit of a particular party. Moreover, court appointed experts do not become the representatives on behalf of a particular party. Such experts serve as an independent source of assistance to the court, and from whom the parties may learn of his or her findings.

Although an expert witness would be of value to the plaintiff, such can be said of virtually all civil cases. At present, the court is not aware of any Nevada or federal statute or rule which provides for the payment of expert witness fees in civil cases on behalf of indigent plaintiff. *See*, Magistrate's Report and Recommendation, court docket #19, p. 3.

Rule 706 is not such a provision. Fed.R.Evid. 706. It permits a court to appoint its own witness, not to undertake to pay the fees for a party's expert witness. In fact, subsection (b) provides that the compensation for such expert "is payable from funds which may be provided by law *in criminal cases and civil actions* and proceedings *involving just compensation under the Fifth Amendment*." Fed.R.Evid. 706(b). In all other cases the parties themselves pay for the appointment of the court's expert. "In other civil actions and proceedings the

compensation [of the expert witness] shall be paid by the parties...." *Id.*

Accordingly, the plaintiff's motion (court docket #23, is *denied*.

DATED this 2nd day of SEPTEMBER, 1988.

/s/ Phyllis Halsey Atkins
UNITED STATES MAGISTRATE